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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHELLE ELIZABETH ANNE USHER, Defendant and Appellant.	G055558 (Super. Ct. No. 15HF1299) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed as modified.

Tyrone Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted Michelle Elizabeth Anne Usher of one count of felony aggravated assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The trial court suspended imposition of sentence and placed Usher on three years' formal probation with various terms and conditions, including the condition that she serve 300 days in jail. The court awarded her two days of credit for actual time served but no conduct credit.

On appeal, Usher contends she is entitled to two additional days of presentence custody credit under Penal Code section 4019. We agree and direct the trial court to award her a total of four days of presentence custody credit. Usher also contends that two probation conditions are unconstitutionally vague and overbroad and therefore must be stricken or modified. One condition requires her to seek training, schooling, and employment and to maintain a residence as approved by the probation officer. The other condition requires her not to associate with certain classes of people. We will modify those conditions as set forth in the disposition. We affirm the judgment and probation order as modified.

DISCUSSION[1]

I. Presentence Custody Credit

Usher contends she is entitled to four days of presentence custody credit rather than the two days awarded by the trial court. The Attorney General agrees with her, and so do we.

Under Penal Code section 4019, subdivision (f), "a term of four days will be deemed to have been served for every two days spent in actual custody." Penal Code

[1] Usher's appeal is limited to the issues of entitlement to presentence custody credit and the facial validity of two probation conditions. Because the appeal does not raise any issue related to the facts or evidence of the underling offense, we omit the traditional statement of facts. (*People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.)

section 4019, subdivision (e) provides, "[a] deduction shall not be made under this section unless the person is committed for a period of four days or longer." Thus, in order to receive good conduct credit at the rate specified in subdivision (f), a person must be committed for at least four days. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1282.) Penal Code section 4019, subdivision (e), which uses the word "committed" rather than the word "confined," requires only that a person be ordered to spend at least four days in custody to receive conduct credit, not that a person must actually spend four days in custody before sentencing. (*People v. Dieck* (2009) 46 Cal.4th 934, 937, 940-941.)

As the Attorney General acknowledges, Usher was ordered to spend 300 days in jail and, therefore, was entitled to earn presentence custody credit. Because she had two actual days of custody, she is entitled to four days of custody credit under Penal Code section 4019, subdivision (f).

II. Probation Conditions

A. *Legal Standards*

Usher did not object to or question either of the challenged probation conditions in the trial court. By failing to object below, Usher has forfeited all claims except a challenge on the ground the probation conditions are vague or overbroad and therefore facially unconstitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888.) Our review is limited to determining whether, as a matter of law, each probation condition on its face is unconstitutionally vague or overbroad. (*Id*. at pp. 888-889; *People v. Barajas* (2011) 198 Cal.App.4th 748, 753 ["A Court of Appeal may also review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record"].)

Trial courts generally have broad discretion to impose reasonable probation conditions "in order to foster the reformation and rehabilitation of the offender while protecting public safety." (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 656.) We review the imposition of a particular probation term or condition for abuse of discretion. (*Ibid.*) We review de novo the question whether a probation term or condition is unconstitutionally vague or overbroad. (*Ibid.*)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K., supra*, 40 Cal.4th at p. 890.) The test is whether the condition "'forbids or requires the doing of an act in terms so vague' that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.'" (*People v. Hall* (2017) 2 Cal.5th 494, 500-501.)

B. *Condition Regarding Training, Schooling, Employment, and Residence*

1. *Vagueness*

The reporter's transcript reflects the trial court orally imposed this probation condition: "[S]eek training, schooling, *and* employment and maintain [a] residence as approved by your probation officer." (Italics added.) Usher contends this condition is unconstitutionally vague for two reasons: (1) By using *and* instead of *or*, a person of common intelligence would have to guess at whether the condition requires the person to seek all three things—training, schooling and employment; and (2) it is unclear whether the clause "as approved by your probation officer" applies to the entire condition or just to the requirement that she "maintain [a] residence."

On the first point, the condition orally imposed by the trial court differs from the condition recited in the court minutes. The court minutes recited this probation condition: "Seek training, schooling, *or* employment and maintain [a] residence as approved by your probation officer." (Italics added.) "Frequently, as here, we encounter discrepancies in how the probation conditions imposed are stated in the reporters' versus clerks' transcripts. In this case, there are unexplained major and minor differences between the conditions proposed in the probation report and adopted by the trial court and the conditions in the signed minute order. When an irreconcilable conflict exists between the transcripts of the court reporter and the court clerk, the modern rule is not automatic deference to the reporter's transcript, but rather adoption of the transcript due more credence under all the surrounding circumstances." (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 586, fn. omitted, disapproved on another ground in *People v. Hall* (2017) 2 Cal.5th 494, 504.)

Under the circumstances, the court minutes are due more credence than the reporter's transcript. It would not be reasonable to require Usher to seek, or to engage in, training, schooling, and employment all at the same time. In sentencing Usher, the trial court followed the probation report's recommendation of suspending sentence and imposing three years of formal probation. The probation report recommended a condition that Usher "[s]eek and maintain suitable training, schooling *or* employment as approved by the probation officer." (Italics added.) Because the trial court followed the probation report's sentencing recommendation, the trial court also must have intended to follow the probation report's proposed probation conditions. As the Attorney General points out, courts routinely impose the condition that the probationer seek "training, schooling or employment." (E.g., *People v. Bravo* (1987) 43 Cal.3d 600, 602, fn. 1; *People v. Abrams* (2007) 158 Cal.App.4th 396, 398; *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1127.) Thus, the probation condition stated in the court minutes

controls. Usher does not contend the condition as stated in the court minutes is vague as to her obligations to seek training, schooling, *or* employment.

As to Usher's second claim of vagueness, we agree that, as phrased, it is unclear whether the clause "as approved by your probation officer" applies to the entire probation condition or just to the residence requirement. The probation report clarifies that the approval clause applies to the entire condition. The probation report breaks this probation condition into two separate proposed conditions. The first sentence of proposed condition No. 14 is "[s]eek and maintain suitable training, schooling or employment as approved by the probation officer." The residence requirement is set forth separately as proposed condition No. 15: "Maintain a residence subject to the approval of the probation officer." As we have explained, the trial court, by following the probation report's sentencing recommendation, must have intended to follow the report's recommendation that the probation officer's approval was required. We will therefore modify this probation condition to read: "Seek training, schooling, or employment as approved by your probation officer. Maintain a residence as approved by your probation officer."

2. *Overbreadth*

Usher contends this probation condition is unconstitutionally overbroad because it makes her choice of residence subject to approval by her probation officer. We consider whether the probation condition is invalid as a matter of law, without taking into account the particular facts of the case, because Usher's trial counsel did not object to or comment on the condition at trial. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 875, 888-889.) While our inquiry "does not take into account the individual facts pertaining to this particular probationer," we do consider "the nature of the case and the goals and needs of probation in general." (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 993-994.)

A probation condition making a probationer's choice of residence subject to a probation officer's approval is not per se unconstitutional. "Although conditions

requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association [citation], courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality [citation]. A trial court may impose probation conditions that place limits on constitutional rights if they are reasonably necessary to meet the twin goals of rehabilitation of the defendant and protection of the public." (*People v. Arevalo, supra,* 19 Cal.App.5th at p. 657.) "The condition here presumes a probation officer will not withhold approval for irrational or capricious reasons." (*Id.* at p. 658.)

Considering the nature of this case, a probation condition requiring approval of Usher's residence was not unconstitutional as a matter of law because Usher was convicted of committing aggravated assault. That condition, on its face, was reasonably necessary to protect the victim.

C. *Condition Regarding Personal Associations*

Usher also challenges this probation condition: "Do not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, *or otherwise disapproved of by probation or mandatory supervision*." (Italics added.) She argues the italicized part of this condition is unconstitutionally overbroad because it has no meaningful standards to prevent the probation officer from infringing on her right to freedom of association. We agree.

A probation condition may restrict the probationer's right to associate if the condition is primarily designed to meet the goals of rehabilitation and protection of the public and is reasonably related to those goals. (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1356 (*O'Neil*).) Thus, a defendant who has been convicted of drug possession may validly be subject to a probation condition that the defendant not associate with persons known by the defendant to be drug users. (*Id*. at pp. 1356-1357.)

A probation condition is constitutionally overbroad, however, if it places no limits on the persons with whom the probation officer may prohibit the probationer from

associating. In *O'Neil*, *supra*, 165 Cal.App.4th at page 1354, one of the probation conditions was "'[y]ou shall not associate socially, nor be present at any time, at any place, public or private, with any person, as designated by your probation officer.'" The Court of Appeal held that condition was unconstitutionally overbroad because it "d[id] not identify the class of persons with whom defendant may not associate nor d[id] it provide any guideline as to those with whom the probation department may forbid association." (*Id*. at pp. 1357-1358.) The condition was "unlimited" and would have allowed the probation officer "to banish defendant by forbidding contact with his family and close friends, even though such a prohibition may have no relationship to the state's interest in reforming and rehabilitating defendant." (*Id.* at p. 1358.)

The challenged portion of the probation condition in this case suffers the same flaw as the condition held to be invalid in *O'Neil*. The probation condition properly prohibits Usher from associating with persons known to her to be parolees, on postrelease community supervision, convicted felons, or users or sellers of illegal drugs. But the challenged portion of the condition also prohibits Usher from associating with persons "otherwise disapproved of by probation or mandatory supervision." That portion of the probation condition is overbroad and "permits an unconstitutional infringement on defendant's right of association." (*O'Neil*, *supra*, 165 Cal.App.4th at p. 1358.)

The Attorney General argues the California Supreme Court's decision in *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*) has changed "the legal landscape . . . since *O'Neil*." In *Olguin*, the court addressed the constitutionality of a probation condition requiring the defendant to "'[k]eep the probation officer informed of . . . pets'" and give "'written notice to the probation officer twenty-four (24) hours prior to any changes.'" (*Id*. at p. 380.) The defendant argued the limitation on pets was not related to his future criminality, violated his fundamental rights, and was unconstitutionally overbroad. (*Id.* at p. 378.) The Supreme Court upheld the condition because "[a] condition of probation that enables a probation officer to supervise his or her charges

effectively is, therefore, 'reasonably related to future criminality.'" (*Id.* at pp. 380-381.) Although the condition "encompasse[d] the gamut of pets from puppies to guppies," the court observed it did not "'authorize a probation officer to irrationally or capriciously exclude a pet.'" (*Id.* at p. 383.)

The challenged probation condition here is different in material respects from that at issue in *Olguin*. First and foremost, the condition in *Olguin* required the probationer to notify and inform the probation officer, while the challenged condition here flatly prohibits Usher from associating with anybody disapproved by probation. Second, the challenged condition in *Olguin* concerned pets, not personal associations. The Supreme Court declined to apply a constitutional standard to the pet condition "in the absence of a showing that the probation condition infringes upon a constitutional right." (*Olguin, supra,* 45 Cal.4th at p. 384.) The court doubted whether the defendant had a constitutional right to own a pet or a constitutionally protected interest in sharing his home with "any animal of his choice." (*Id.* at pp. 384-385.) Third, the Supreme Court in *Olguin* found that "[r]eporting the presence of pets to a probation officer is a simple task, imposes no undue hardship or burden, and is a requirement that clearly falls within the bounds of reason." (*Id.* at p. 382.) The same cannot be said of a requirement to obtain probation department approval of every person with whom a probationer might associate or face a potential probation violation.

We shall modify the personal association probation condition by deleting the phrase "or otherwise disapproved of by probation or mandatory supervision."

DISPOSITION

The trial court is directed to modify the judgment to reflect an award of four days of presentence custody credit.

The probation condition that states, "Seek training, schooling, and employment and maintain residence as approved by your probation officer" is modified

to read: "Seek training, schooling, or employment as approved by your probation officer. Maintain a residence as approved by your probation officer."

The probation condition that states, "Do not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, or otherwise disapproved of by probation or mandatory supervision" is modified to read: "Do not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs."

The trial court is directed to notify the appropriate supervising authorities of the modifications. As so modified, and in all other respects, the judgment and probation order are affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.